Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **201218010**
Release Date: 5/4/2012

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POSTS-140059-11

UILC: 45K.00-00

date: November 22, 2011

to:
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from:

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subject: Qualification of coke or coke gas facilities under section 45K of the Internal Revenue Code

This Chief Counsel Advice memorandum responds to your request for assistance, dated September 27, 2011, concerning whether a taxpayer must meet certain requirements of §§ 45K(e) and (f) of the Code in order to claim a credit pursuant to § 45K(g).

ISSUE

Whether a taxpayer must meet the requirement of § 45K(e)(1)(B) and place its facility in service after December 31, 1979, in order to claim a credit pursuant to § 45K(g) for fuel produced at a facility for producing coke or coke gas other than from petroleum products.

CONCLUSION

A facility producing fuel from coke or coke gas other than from petroleum based products need not be placed in service after December 31, 1979, to qualify for a credit under § 45K(g).

FACTS

Taxpayer's coke facility was placed in service prior to December 31, 1979. Exam identified the taxpayer at issue as having claimed credit for producing fuel from a nonconventional fuel source pursuant to §45K(g) for the production of coke or coke gas (other than from petroleum based products), for taxable years 2006 through 2009.

Exam has learned that the taxpayer and its parent corporation, brother/sister entities, and subsidiaries, never sold coke gas prior to the years in which it took a § 45K credit. Thus, the taxpayer would not have been eligible for the credit under the old §29. Exam is confident that the taxpayer and related entities never claimed a § 29 credit for the coke facility. Our analysis and conclusions are based are this underlying premise.

LAW AND ANALYSIS

The § 45K credit (the Credit) was redesignated from former § 29 of the Code by § 1322(a)(1) of the Energy Act of 2005, Pub. L. No 109-58, effective for tax years ending after 2006. Prior to its redesignation, the Credit was not part of the general business credit and no carryover of any unused credit was permitted. This provision was originally enacted as § 44D of the Code by § 231(a) of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, effective for tax years ending after 1979. It was redesignated from § 44D to § 29 by the Tax Reform Act of 1984, P.L. 98-369.

The Credit has, in most cases, expired. The Credit has expired at different times for different fuels. Originally, pursuant to §§ 45K(e) and 45K(c)(1), the Credit for the following qualified fuels were available: (1) oil produced from shale and tar sands; (2) gas produced from geopressured brine, Devonian shale, coal seams, or a tight formation, or biomass; and (3) liquid, gaseous, or solid synthetic fuels produced from coal (including lignite) including such fuels when used as feedstocks. The Credit was available for those fuels that were: (1) either produced from a well drilled after 1979 and before 1993, or produced in a facility placed in service after 1979 and before 1993; and (2) sold before 2003.

More recently, pursuant to § 45K(f), the Credit applied to a facility producing gas from biomass or producing liquid, gaseous, or solid synthetic fuels from coke if it was placed in service after 1992 and before July 1, 1998, provided the fuel was sold before 2008. Section 45K(f)(2) provides that this particular extension was not available to a facility that produced coke or coke gas unless the original use of the facility began with the taxpayer claiming the Credit.

Notwithstanding these placed in service rules, § 45K(g) established separate deadlines for synthetic fuel produced from facilities producing coke or coke gas other than from petroleum based products. Under § 45K(g)(1), the Credit is available for a facility producing coke or coke gas (other than from petroleum based products) that

was placed in service before 1993, or after 1998 and before 2010, and sold during the period: (1) beginning on the later of January 1, 2006, or the date that the facility is placed in service; and (2) ending on the date that is four years after the date that period began. In addition, § 45K(g)(2)(C) provides that this special rule does not apply to any facility producing qualified fuels for which a credit was allowed under the tax year (or a preceding tax year) by reason of the extension for certain facilities under § 45k(f).

Specifically, the introductory language of § 45K(g) (which contains rules in the case of certain coke or coke gas facilities other than from petroleum based products) provides for these deadlines "notwithstanding subsection 45K(e)" that contains expired effective date provisions for the Credit (including that portion of the requirement of § 45K(e)(2)) requiring that the facility be placed in service after December 31, 1979). This introductory language, then, directs a taxpayer to look to § 45K(g) rather than § 45K(e) for determining the availability of the Credit for a facility producing coke or coke gas other than from petroleum based products. Accordingly, it is our view that a taxpayer claiming the Credit under the extension provisions of § 45K(g) is not required to place its facility in service after December 31, 1979.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call at if you have any further questions.